Supreme Court, U.S.
FILED
MAY 21 2002
CLERK

No. 01-1564

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2001

FRANKLIN DAVID CHAMBERS, M. D.,
PETITIONER,
v.
HAROLD PATRICK STERN, M.D., GEORGE HAMILTON, M.D., AND UNIVERSITY OF ARKANSAS BOARD OF TRUSTEES,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

RESPONDENTS' BRIEF IN OPPOSITION

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Questions Presented

1. Having never argued to the Arkansas Supreme Court that judicial immunity offends the Due Process Clause of the United States Constitution, may Dr. Chambers do so now?

2. If Dr. Chambers's new federal constitutional argument is proper, does the variation in tort law (including judicial immunity) among the several states offend the Due Process Clause of the United States Constitution?

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Statement Of The Case

In the wake of a bitter divorce, Dr. Franklin David Chambers sued the court-appointed therapist (Dr. Harold Patrick Stern) who evaluated and counseled the Chambers family during the divorce proceedings. He alleged medical malpractice. He also sued one of Dr. Stern's colleagues (Dr. George Hamilton) and their mutual employer, the University of Arkansas. Based on a failure of proof, and settled Arkansas law, the trial court entered judgment as a matter of law for Dr. Hamilton and the University. The trial court also granted Dr. Stern judgment as a matter of law, ruling that judicial immunity covered Dr. Stern's treatment of the Chambers family under the court orders defining his appointment.

In his first appeal to the Arkansas Supreme Court, Dr. Chambers argued that the trial court "impermissibly expanded the doctrine of judicial immunity to cover a court-appointed physician's 'treatment' of the parties." *Chambers v. Stern,* 994 S.W.2d 463, 465 (Ark. 1999)(*Chambers I*); **Respondents' Supplemental Appendix ("Supp. App.") A6.** He also argued that judicial immunity denied his right to a jury trial under the Arkansas Constitution. 994 S.W.2d at 464; **Supp. App. A2, B1.** Dr. Chambers made no federal due process attack on judicial immunity in his first appeal.

The Arkansas Supreme Court held that "a court-appointed physician is entitled to judicial immunity so long as he is serving an integral part of the judicial process, by carrying out and acting within the scope of a court's order[,]" but remanded the case for the trial court to make specific findings about whether Dr. Stern acted within the scope of his appointment. *Chambers I*, 994 S.W.2d at 466-67; **Supp. App. A9-10.** The Court did not reach Dr. Chambers's argument about his jury-trial rights under the Arkansas Constitution. *Id.* at 464; **Supp. App. A2.**

On remand, the trial court decided that Dr. Stern's treatment of the Chambers family fell within the scope of his judicial appointment. **App. 22-23**. Dr. Chambers again appealed to the Arkansas Supreme Court, challenging the trial court's scope-of-appointment ruling and its dismissals of his claims against Dr. Hamilton and the University. Again, Dr. Chambers raised no federal due process issue. The Arkansas Supreme Court affirmed all the trial court's rulings, and denied Dr. Chambers's later request for rehearing. *Chambers v. Stern*, 64 S.W.3d 737, 741, 744-45 (Ark. 2002) (*Chambers II*); **App. 7, 13-18, 25.**

Dr. Chambers now asks this Court to consider a due process challenge to the Arkansas Supreme Court's rulings on judicial immunity.

The Reasons For Denying The Writ

There are no "compelling reasons" to grant Dr. Chambers's petition. Sup. Ct. R. 10. There are, in fact, no good reasons to do so.

Dr. Chambers's petition does not comply with this Court's rules. Heralding the importance of raising and preserving federal questions, Rule 14 obligated Dr. Chambers to document for this Court in his statement of this case when and how he raised his due process argument, and how the trial court and the Arkansas Supreme Court passed on that question. Sup. Ct. R. 14.1(g)(i). But Dr. Chambers stands silent on the whens and hows. That omission is fatal and provides "sufficient reason for the Court to deny a petition." Sup. Ct. R. 14.4.

Dr. Chambers's omission is understandable -- he never raised any federal issue before the Arkansas Supreme Court. And that Court never considered the due process implications of its decision nor made any ruling about due process. This case, then, involves no state court decision on any federal question, much less a decision on a federal question that conflicts with other state courts' decisions. Sup. Ct. R. 10(b). Thus the Arkansas Supreme Court's decision in this case fails to qualify for review on a writ of certiorari. Sup. Ct. R. 10.

Dr. Chambers's petition only seeks review of the Arkansas Supreme Court's extension of judicial immunity to Dr. Stern. It therefore misnames Dr. Hamilton and the University as respondents. The petition complains about the trial court's dismissals of the claims against those parties, but makes no argument that the Arkansas courts' handling of those claims offended any federal law. There was nothing federal about the Arkansas courts' decisions on Dr. Hamilton and the University: Dr. Chambers's claims against them failed for lack of proof under settled Arkansas law. And none of that law involved either judicial immunity or federal law. *Chambers II,* 64 S.W.3d at 741-44; **App. 5-14.**

Dr. Chambers focuses his petition on whether the judicial immunity afforded Dr. Stern compromised Chambers's federal due process rights. It does not. In any event, Dr. Chambers presented only state-law questions to the Arkansas Supreme Court. Finally, Arkansas's decision to afford greater protection than some other states to court-appointed experts under its common-law doctrine of judicial immunity neither violates due process nor merits this Court's attention.

1. Dr. Chambers's Defective Petition Justifies A Summary Denial.

Litigants must preserve a federal question to create jurisdiction in this Court to review a state court's decision. *Webb v. Webb*, 451 U.S. 493, 495-96 (1981). This Court mandates that petitions for review of state-court decisions specify "the stage in the proceedings [below] . . . when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts[.]" Sup. Ct. R. 14.1(g)(i); *Webb*, 451 U.S. at 495. This, however, Dr. Chambers failed to do. His failure to demonstrate this Court's jurisdiction as required by the Rules entitles this Court to deny his petition without even considering the merits. Sup. Ct. R. 14.4. It should do so.

2. Dr. Chambers Never Raised Due Process In The Arkansas Supreme Court And Cannot Do So Now.

Dr. Chambers's petition is defective for another reason. He never raised a federal due process question before the Arkansas Supreme Court.

In his first appeal, Dr. Chambers argued that the trial Court impermissibly expanded common law

judicial immunity to actual treatment rendered by a court-appointed physician. *Chambers I*, 994 S.W.2d at 465; **Supp. App. A6.** He did present a constitutional argument in that appeal: that judicial immunity violated his right to a jury trial under the Arkansas Constitution. *Id.* at 464; **Supp. App. A2, A16-17, B1**. Dr. Chambers, however, did not argue due process in his first appeal.

Dr. Chambers's second appeal dealt only with state-law questions too. He disputed the legal standard for surviving a properly supported motion for summary judgment and whether a state-chartered and state-funded university deserved sovereign immunity. *Chambers II*, 64 S.W.3d at 741, 743-45; **App. 7, 10, 13-15**. He again challenged the correctness of giving Dr. Stern judicial immunity under Arkansas law. But as in his first appeal, Dr. Chambers did not make a federal due process challenge about anything.

Dr. Chambers's "right to a jury trial" argument in the *Chambers I* appeal was insufficient to raise a federal due process question before the Arkansas Supreme Court. In *Adams v. Robertson*, the petitioners presented a "right to jury trial" argument on state constitutional grounds to Alabama's highest court, and mentioned a relevant federal due process decision in that discussion. 520 U.S. 83, 86 (1997). But the *Adams* petitioners' mention of a "federal case, in

the midst of an unrelated argument," was insufficient to raise a federal question. *Id.* at 88. This Court "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision [this Court has] been asked to review." *Id.* at 86. Neither event happened here. Because this Court refuses "to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider[,]" this Court should deny Dr. Chambers's petition. *Id.* at 90.

3. This Court Has No Jurisdiction Over Matters Of Purely State Law.

All the issues Dr. Chambers raised before the Arkansas Supreme Court about the extension of judicial immunity to Dr. Stern centered on how Arkansas courts would apply that common-law doctrine, and whether Dr. Chambers presented any proof that Dr. Stern acted outside the scope of his court appointment. **App. 15, 18; Supp. App. A1-2.** Therefore no federal issue exists for review by this Court.

Whether Arkansas affords court-appointed experts greater protection than some other states from tort liability under state law cannot support a writ of certiorari. Sup. Ct. R. 10. This Court has "no

power to revise judgments on questions of state law." *Henry v. Mississippi*, 379 U.S. 443, 447 (1965). Questions of state law are the only questions that the Arkansas Supreme Court considered in the *Chambers* decisions. Those decisions, therefore, are not subject to review under either this Court's precedent or its Rules. *Henry*, 379 U.S. at 447; Sup. Ct. R. 10(b).

4. Arkansas's Extension Of Judicial Immunity To Court-Appointed Therapists Does Not Deny Due Process Anyway.

The extension of judicial or quasi-judicial immunity to court-appointed therapists like Dr. Stern furthers an important purpose -- to foster an independent and impartial exercise of discretion vital to the judicial process by eliminating potential damages liability. *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435-36 (1993). Our courts recognize that experts like Dr. Stern would likely be loath to accept court-appointed discretionary duties if their actions could be subject to state-law tort claims. *Id.*

This Court has considered whether state immunity laws abridge federal constitutional rights, and answered "no." In *Martinez v. California*, 444 U.S. 277 (1980), this Court reviewed a California statute granting immunity to members of the state's

parole board for decisions made in their official capacities. The petitioner argued that the California law deprived him, in violation of the U. S. Constitution, of both due process and a property interest in his cause of action. In upholding the validity of the California law, this Court stated that "it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernable federal interest[.]" *Martinez*, 444 U.S. at 282.

Arkansas's tort laws and defenses are the only issues in this case. Arkansas's interest in defining those laws is substantial, and its protection of court-appointed experts from tort liability for discretionary actions taken pursuant to a state court's orders cannot amount to a due process violation under federal law.

The Arkansas Supreme Court's interpretation and extension of common law judicial immunity remained faithful to the sound principles behind that doctrine. That purely state-law decision was correct, and this Court should decline to review it.

5. The Questions Presented Do Not Concern Dr. Hamilton Or The University.

Dr. Chambers asks this Court to review the Arkansas Supreme Court's extension of judicial immunity to Dr. Stern. He raises no questions about the correctness of the judgments in favor of Dr. Hamilton and the University. Those Respondents neither claimed judicial immunity nor benefitted from the Arkansas courts' judicial-immunity rulings.

The only issue Dr. Chambers raised on appeal about the University was whether Arkansas's sovereign immunity extended to that state institution. **App. 7**. It did. That sovereign immunity does not raise a federal question, and Dr. Chambers does not contend otherwise.

The only issues Dr. Chambers raised on appeal about Dr. Hamilton were settled issues of Arkansas law. The Arkansas Supreme Court affirmed the trial court's entry of judgment as a matter of law for Dr. Hamilton on Dr. Chambers's claims of conspiracy and medical malpractice. The Arkansas Supreme Court described Dr. Chambers's conspiracy claim as "pure conjecture" and rejected his malpractice claim for a complete failure of proof.

Chambers II, 64 S.W.3d at 744-45; **App. 13-15.**

As to Dr. Hamilton and the University, Dr. Chambers raises no issues of judicial immunity; he asserts no variation in state law; and he asserts no due process or other constitutional issues. And none of those questions arise in this record as to these two misnamed Respondents.

Conclusion

This Court should deny Dr. Chambers's Petition.

Respectfully submitted,

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Respondents' Supplemental Appendices

A. *Chambers v. Stern*, 994 S.W.2d 463 (Ark. 1999)(*Chambers I*)

99-20

FRANKLIN DAVID CHAMBERS, M.D., APPELLANT, VS. HAROLD PATRICK STERN, M.D., APPELLEE.	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, SIXTH DIVISION NO. CV 97-7272 HONORABLE DAVID BOGARD, CIRCUIT JUDGE REVERSED AND REMANDED

W. H. "DUB" ARNOLD, Chief Justice

The instant appeal arises from a medical malpractice action filed by the appellant, Franklin David Chambers, M.D., against the appellee Harold Patrick Stern, M.D. On appeal, Chambers challenges the trial court's orders (1) granting Dr. Stern's motion to dismiss or, alternatively, his motion for summary

judgment, based upon Dr. Stern's entitlement to absolute judicial immunity, (2) striking evidence filed by Chambers in supplementation of his response to Dr. Stern's summary-judgment motion, and (3) expanding judicial immunity to medical "treatment" in violation of Chambers's constitutional right to a jury trial.

Our jurisdiction is authorized pursuant to Ark. Sup. Ct. Rule 1-2(b)(6) (1998). We accepted certification of this case from the Court of Appeals in order to resolve an issue of first impression, namely, whether the application of judicial immunity to a court-appointed physician engaged in medical "treatment' violates a party's constitutional right to a jury trial. Although we do not reach the constitutional issue, we reverse and remand on appellant's first point. Specifically, we hold that the trial court erred in granting appellee's summary-judgment motion because genuine issues of material facts remain.

Chambers commenced his medical malpractice action against Dr. Stern, and other parties not relevant to this appeal, on June 30, 1997. Dr. Stern had been appointed by a chancery court to assist it in evaluating custody and visitation issues arising from Chambers's pending divorce action. In part, the chancellor ordered that Dr. Stern meet, evaluate, and counsel Chambers, his minor children, and his former wife, throughout the divorce proceedings.

Chambers and his wife agreed to the appointment of Dr. Stern, who over a four-year period evaluated them and their children, engaged them in therapy, and reported his findings, observations, and recommendations to the chancellor.

Subsequently, Chambers contended that Dr. Stern committed malpractice during the therapy or "treatment" phase with the family members. In response, Dr. Stern filed a motion to dismiss or, alternatively, a motion for summary judgment, claiming that he was entitled to judicial immunity while he was carrying out the chancery court's order. After reviewing the parties' pleadings, exhibits, depositions, and affidavits, the trial court agreed with Dr. Stern and dismissed the malpractice action. Notably, the trial court concluded that Dr. Stern was entitled to absolute judicial immunity, extending from the chancellor's order appointing him to evaluate and treat the parties. From the order dismissing Chambers's malpractice action, comes the instant appeal.

Summary-judgment motion

Appellant's first point on appeal challenges the trial court's order granting Dr. Stern's motion for dismissal or, alternatively, his motion for summary judgment. Generally, this court reviews a trial court's decision on a motion to dismiss by treating the facts

alleged in the complaint as true and viewing them in the light most favorable to the plaintiff, here, Chambers. See *Hames v. Cravens*, 332 Ark. 437, 440-41, 966 S.W.2d 244 (1998) (citing *Neal v. Wilson*, 316 Ark. 588, 595-96, 873 S.W.2d 552 (1994) (citing *Gordon v. Planters & Merchants Bancshares, Inc.*, 310 Ark. 11, 832 S.W.2d 492 (1992); *Battle v. Harris*, 298 Ark. 241, 766 S.W.2d 431 (1989)); *Mid-South Beverages, Inc.*, 300 Ark. 204, 205, 778 S.W.2d 218 (1989)(citing *Battle*, 298 Ark. 241, 766 S.W.2d 431)). Significantly, a trial judge must look only to the allegations in the complaint to decide a motion to dismiss. *Hames*, 332 Ark. at 441, 966 S.W.2d 244 (citing *Neal*, 316 Ark. at 596, 873 S.W.2d 552 (citing *Wiseman v. Batchelor*, 315 Ark. 85, 864 S.W.2d 248 (1993); *Deitsch v. Tillery*, 309 Ark. 401, 833 S.W.2d 760 (1992)); *Mid-South Beverages, Inc.* 300 Ark. at 205, 778 S.W. 2d 218 (citing *Battle*, 298 Ark. 241, 766 S.W.2d 431))).

Although the trial court "dismissed" Chambers's action, it acknowledged that it considered matters outside the parties' pleadings, including exhibits, depositions, and affidavits. Accordingly, we treat the trial court's order as one granting Dr. Stern's motion for summary judgment. In reviewing

summary-judgment cases, this court need only decide if the trial court's grant of summary judgment was appropriate based on whether the evidence presented by the moving party left a material question of fact unanswered. Further, the moving party always bears the burden of sustaining a motion for summary judgment. All proof must be viewed in the light most favorable to the resisting party, and any doubts must be resolved against the moving party. The moving party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Ark. R. Civ. P. 56 (1998); *Robert D. Holloway, Inc. v. Pine Ridge Add'n Resid. Prop. Owners*, 332 Ark. 450, 453, 966 S.W.2d 241, 243 (1998) (citing *McCutchen v. Huckabee*, 328 Ark. 202, 943 S.W.2d 225 (1997)).

Once the moving party makes a prima facie showing that it is entitled to summary judgment, the opponent must meet proof with proof by showing a material issue of fact. *Dillard v. Resolution Trust Corp.*, 308 Ark. 357, 359, 824 S.W.2d 387, 388 (1992). However, if a moving party fails to offer proof on a controverted issue, summary judgment is

not appropriate, regardless of whether the nonmoving party presents the court with any countervailing evidence. *Collyard v. American Home Assurance Co.*, 271 Ark. 228, 230, 607 S.W.2d 666, 668 (1980).

In his response to Dr. Stern's summary-judgment motion, Chambers asserted that the trial court impermissibly expanded the doctrine of judicial immunity to cover a court-appointed physician's "treatment" of parties. The rationale behind judicial immunity is to maintain an independent and impartial judiciary. *See generally,* 48A C.J.S. § 86 (1981 & Supp. 1999). When a public officer is granted discretion and empowered to exercise his independent judgment, like a judge, he becomes a quasi-judicial officer and may enjoy judicial immunity when he is acting within the scope of his authority. *See* 46 Am. Jur. 2d § 70 (1994 & Supp. 1999).

We recently examined the concept of judicial immunity in *Robinson v. Langdon*, 333 Ark. 662, 970 S.W.2d 292 (1998). We noted that judicial immunity is absolute immunity, and we adopted a six-factor test to be considered in determining absolute immunity: (1) the need to assure that the individual can perform his functions without harassment or intimidation, (2) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct, (3) insulation from

political influence, (4) the importance of precedent, (5) the adversary nature of the process, and (6) the correctability of error on appeal. *Robinson*, 333 Ark. at 670, 970 S.W.2d at 296. Consistent with these factors, the parties agree that absolute judicial immunity extends to physicians appointed by courts to assist in "evaluations." However, the parties dispute whether judicial immunity continues to shield the court-appointed physician when the evaluation phase progresses to treatment or therapy. Significantly, there is no Arkansas case law on point.

We look, then, to other jurisdictions that have considered the issue before us. For example, in *Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987), the Eighth Circuit considered the issue of when immunity is appropriate and concluded that:

> nonjudicial persons who fulfill quasi-judicial functions intimately related to the judicial process have absolute immunity for damage claims arising from their performance of the delegated functions.

Myers, 810 F.2d at 1466-67 (citing *Demoran v. Witt*, 781 F.2d 155, 157 (9th Cir. 1986)).

Similarly, the Supreme Court of Iowa first addressed the issue in *Muzingo v. St. Luke's Hosp.*, 518 N.W.2d 776 (Iowa 1994). Prior to *Muzingo*, the Iowa court extended quasi-judicial immunity to non-

judicial officers when their actions were "integral to the judicial process." *Muzingo*, 518 N.W.2d at 777. However, in *Muzingo*, the key issue before the court was whether a court-appointed psychiatrist's and hospital's activities were an integral part of the judicial process so that to deny immunity would disserve the broader public interest that nonjudicial officers act without fear of liability. The high court determined that the court-appointed psychiatrist and hospitals were entitled to quasi-judicial immunity because they were acting as an arm of the court. In support of its position, the court also cited, with approval, the Eighth Circuit's decision in *Myers*. Additionally, the court noted that the focus of its inquiry was on the nature of the function performed and not on the identity or title of a particular actor. *Id.*

Public policy considerations also compel us to extend judicial immunity to court-appointed therapists. Psychologists and other experts would be reluctant to accept appointments if they were subject to personal liability for actions taken in their official capacities. See *Doe v. Hennepin County*, 623 F. Supp. 982, 986 (D.C. Minn. 1985). In that vein, we agree with the Minnesota District Court that court-appointed therapists are entitled to absolute immunity for acts committed "within the scope of their

appointments." *Doe*, 623 F. Supp. at 986.

The key issue in the instant case is whether Dr. Stern was acting as an arm of the court and performing a quasi-judicial function, or whether he exceeded the scope of the court's order. Notably, in *Doe*, 623 F. Supp. 982 (D.C. Minn. 1985), the plaintiffs could not overcome the therapist's immunity by merely asserting that she was not a good psychologist, or that she should have been a better psychologist. *Id.* In fact, the Minnesota court agreed that the psychologist was entitled to summary judgment as a matter of law because (1) there was no showing that the psychologist was not functioning as a psychologist at all relevant times, (2) the plaintiffs agreed to participate in counseling and selected the therapist, (3) the therapist was officially appointed by the court, and (4) the acts of which the plaintiffs complained were carried out within the scope of the court-appointed capacity. *Doe*, 623 F. Supp. at 986-87.

In conclusion, we hold that a court-appointed physician is entitled to judicial immunity so long as he is serving an integral part of the judicial process, by carrying out and acting within the scope of a court's order. However, from our review of the record before us, the trial court failed to make specific, written findings, in its June 4, 1998, order granting Dr. Stern's motion to dismiss, that Dr. Stern did, in fact, act with-

in the scope of his court appointment during the relevant time periods. Accordingly, on remand, the trial court must determine as a matter of law [1] whether Dr. Stern's actions were within the scope of his court-appointed capacity, and if so, his actions taken pursuant to the appointment are entitled to judicial immunity.

However, if the trial court determines that Dr. Stern's actions were outside the scope of the court's appointment, it must be determined at what point Dr. Stern exceeded the order and, consequently, forfeited his immunity. Specifically, the trial court must review Dr. Stern's involvement with the Chamberses from June 22, 1993, to April 18, 1994, in light of the chancery court's June 22, 1993, temporary relief order directing the following:

> That while the Court does not find a physical and mental evaluation of the parties or the children appropriate, the Court does find that a qualified therapist or counselor agreed to by the parties should *meet with and counsel the parties and the children relative to the divorce proceedings in which they are involved and the visitation and other matters related thereto and to conduct*

[1]Whether absolute immunity exists is a question of law for the courts. *See generally* 46 Am. Jur. 2d § 68 (1994 & Supp. 1999).

> *all necessary evaluations on the parties and children in connection therewith*; that only one therapist or counselor should be used for all the children and the parties and that therapist or counselor should *report directly to the Court his or her findings and observations* and the Court will handle the release of such report to the attorneys for the respective parties; that if the parties are unable to agree on the therapist or counselor to be used, the Court will appoint a therapist or counselor after giving each of the parties an opportunity to supply the Court with the names and qualifications of any therapists or counselors suggested by them for use herein; that Defendant shall be responsible for the payment, as and when due, of all charges made by the therapist or counselor; and that both the parties shall cooperate with and be responsive to the requests and directions of the therapist or counselor involved.

(Emphasis added.)

Next, the trial court must review Dr. Stern's interactions with the Chamberses from April 18, 1994,

through the later of (1) the last therapy session by any family member with Dr. Stern, or (2) Dr. Stern's final communication with the chancery court, in light of the chancery court's April 18, 1994, divorce decree, directing the following:

> The parties and the children are directed to cooperate with the Court appointed therapist, H. Patrick Stern, M.D., *to resolve visitation problems. Visitation is to be pursuant to Dr. Stern's direction pending further order of the Court.*[2] The Defendant is hereby directed to pay all charges associated with the subject therapy related to visitations problems pending further order of the Court.

(Emphasis added.) Only after the trial court resolves the aforementioned legal issues may the jury consider the merits of appellant's malpractice claim.

Viewing the evidence in the light most favorable to Chambers, resolving any doubts against Dr. Stern, and finding that there remain genuine issues as

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[2]We render no opinion regarding (1) the validity of the trial court's instruction that, "Visitation is to be pursuant to Dr. Stern's direction pending further order of the Court," or (2) the effect of the validity of that instruction upon the application of judicial immunity to Dr. Stern. The instruction's validity was not challenged, and these issues are not before us on appeal.

to material facts, we hold that the trial court erred in finding that Dr. Stern was entitled to a judgment as a matter of law. In light of our holding, we need not reach the merits of appellant's remaining arguments.

Reversed and remanded.

GLAZE, J., dissents.

TOM GLAZE, Justice, dissenting. I agree with the majority court that judicial immunity can be extended to a qualified therapist and that the issue of judicial immunity is an issue of law. In reading the record, it appears the chancery judge's appointment of Dr. Harold Stern under his order and decree entered on June 22, 1993, and April 18, 1994, gave Dr. Stern absolute immunity as a matter of law unless a factual issue exists concerning whether Dr. Stern exceeded his quasi-judicial functions. In other words, Dr. Stern's actions were integral to the judicial process. The broad definition of judicial process includes all the acts of a court from the beginning to the end of its proceedings in a given cause. Black's Law Dictionary 1205 (6th ed. 1990). And the term integral, in its ordinary usage, means a part or a constituent component which is necessary or essential to complete the whole. *Id.* at 809.

In the instant case, the chancellor in his June 22 order directed that a qualified therapist counsel the divorcing parties and their children relative to the

divorce proceedings and conduct all necessary evaluations; the therapist was to report his or her findings and observations to the court. The parties agreed that Dr. Stern would perform this role. In his April 18 decree, the chancellor appointed Dr. Stern to resolve visitation problems and visitation was to be made pursuant to Dr. Stern's direction, pending further order of the court. The court's appointment of Dr. Stern and the chancellor's directives were clearly made during and within the divorce proceedings involving David and Debra Chambers and their children, and such appointment and directives were intended to aid the chancellor in the resolution of visitation issues. It is important to note that the chancellor's orders authorized Dr. Stern to counsel the Chambers family. Whether the appointed therapist performed his or her judicial function by conducting evaluations or employing treatment is of little import, since both are cognizable skills used by such professionals when counseling parties.

In contract, if a therapist had been court appointed to provide evaluations of or counseling to divorcing parties and their children, and during the course of that appointment, the therapist hit or struck one of the parties, the therapist could be found to have acted outside his or her quasi-judicial functions

and therefore would not be entitled to immunity. Nor would a court-appointed therapist enjoy such immunity if he or she engaged in unethical sexual intimacies with one of the divorcing parties.

In conclusion, while I agree with the majority court that a court appointed therapist like Dr. Stern is entitled to judicial immunity, I disagree with the court's opinion that the trial court here is required to make any further findings to determine whether Dr. Stern acted within the scope of his quasi-judicial functions. That legal issue and supporting evidence was fully before the trial court and in my view, the record supported the circuit judge's ruling awarding Dr. Stern absolute immunity. Therefore, I respectfully dissent.

B. Dr. Chambers's Appellant's Brief In *Chambers I* (Excerpt).

POINT ON APPEAL NO. 3: EXPANSION OF JUDICIAL IMMUNITY TO MEDICAL TREATMENT IS A DENIAL OF THE FUNDAMENTAL RIGHT TO JURY TRIAL

This issue is advanced because of a concern the right to jury trial is not being afforded primacy in modern law. Certainly as of 1874, the time of the Constitution of the State of Arkansas, no physician had ever been considered for immunity under the doctrine of judicial immunity. The doctrine should not now be expanded so as to eliminate the right to jury trial contrary to the admonition of Article 2, Section 7, constitution of the State of Arkansas, that "[t]he right to jury trial shall remain inviolate." See, for a close analogy, Grimmett v. Digby, 267 Ark. 192, 589 S.W.2nd 579 (1979).